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Potter Anderson & Corroon LLP

Delaware State Bar Association
Environmental Law Section
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I. WETLANDS/SEPTIC SYSTEMS

A. *JNK, LLC v. Kent County Reg'l Planning Comm'n*, 2007 Del. Super. LEXIS 146 (Del. Super. May 9, 2007).

In this appeal from a decision of the Kent County Levy Court (the "Levy Court"), affirming the Kent County Regional Planning Commission's (the "Commission") denial of a preliminary subdivision application, the Court remanded the action back to the Commission for further proceedings. The Court held that it could not reach the merits of the appeal because the Commission failed to set forth its reasons for denying the subdivision application. The Court noted that this appeal may be the first time the Court has been asked to review a disapproval of a subdivision application.

This case stems from the appellant's application, submitted to the Kent County Department of Planning Services (the "Department"), for permission to subdivide 342 acres of land for development. The Commission held a public hearing on the application, at which appellant testified regarding recommendations made by the Department. The Commission expressed concerns related to the lack of information given to the Department regarding the functionality, maintenance and ownership of the community septic system. Specifically, the Commission was concerned about possible system failure and the cost of any environmental damage to homeowners and the county government. Several residents also voiced opposition to the proposed

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plan. The primary concern was the septic system and its possible impact on the environment and surrounding wetlands. The Commission denied appellant's application, citing as its reasons for the denial the environmental health, safety and welfare of the Leipsic River and a lack of information about the proposed community septic system. Appellant appealed the Commission's decision to the Levy Court, which in turn affirmed the Commission's denial of the application, and cited as one of the reasons for its affirmance of the Commission's ruling, the lack of information regarding the community septic system. The appellant appealed to the Superior Court.

In remanding the case back to the Commission for further proceedings, the Court held that it could not reach the merits of the appeal because the Commission failed to state the reasons behind the denial of the application. Of import, the Court noted that the Commission's denial must be based on subdivision, zoning, or any other pertinent regulations. Without references to specific facts and legal provisions in the record outlining the Commission's grounds for denying the application, the Court was unable to determine whether the Commission's decision should be affirmed or reversed. The Court urged the Commission on remand to hold the required hearings and make factual and legal findings based on specific provisions of the Kent County Code. Citations to specific Code provisions should be included in the Commission's final determination, and the Commission should base its decision on regulations applicable to the preliminary plan stage.

B. *Sierra Club v. U.S. Army Corps of Engineers*, 2008 U.S. App. LEXIS 10503 (3d Cir. May 14, 2008).

Plaintiffs brought suit against the USACOE and other defendants, challenging the legality of a permit that the Corps granted to allow the filling of 7.69 acres of wetlands pursuant to section 404 of the Clean Water Act. The District Court denied the plaintiffs' motion for preliminary injunction and later granted summary judgment in favor of the defendants on all claims. At the time of the Third Circuit's decision, the majority of the wetlands had been filled, leaving only two small patches: a 0.09 acre and 0.03 acre patch, each bordering and on opposite sides of the New Jersey Turnpike. The Court held that the case was prudentially moot, "[b]ecause the substantially complete fill forecloses the opportunity for any meaningful relief to Plaintiffs' alleged injuries."

II. ENVIRONMENTAL TORTS/PROPERTY DAMAGE

Alderman v. Clean Earth, Inc., 2007 Del. Super. LEXIS 191 (Del. Super. June 26, 2007).

In this action involving injury to land by pollution, plaintiffs moved to reargue the Superior Court's decision refusing to admit testimony by plaintiffs' two experts under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In denying plaintiffs' motion for reargument, the Court held that plaintiffs' motion presented original, and not new, arguments. The Court determined that plaintiffs' experts could not prove that plaintiffs were harmed by defendants' actions, because, among other things, the experts failed to perform any testing on their hypotheses or to eliminate other possible sources of contamination. The Court noted that the outcome may have been different had plaintiffs' experts provided sufficient evidence, rather than untested hypotheses, to prove causation.

III. INDEMNIFICATION

A. *Pharmacia Corp. v. Motor Carrier Services Corp.*, 2009 U.S. App. LEXIS 2549 (3d Cir. Feb. 10, 2009).

Appellants Motor Carrier Services Corporation ("Motor Carrier") and CSX Intermodal, Inc. ("Intermodal") appealed the District Court's ruling that they were required to indemnify appellee Pharmacia Corporation ("Pharmacia") for costs incurred for the investigation, cleanup, and monitoring of environmental contamination at a site located in Kearney, New Jersey. The Court affirmed the District Court's ruling as to Motor Carrier and Intermodal, but it reversed the District Court's ruling that CSX Corp. ("CSX"), Intermodal's parent, also was responsible for the indemnification costs.

The Court based its ruling on a purchase and sale agreement between Pharmacia and Motor Carrier for the sale of the Kearny site. Subsequent to execution of the sale agreement, Motor Carrier was acquired by Intermodal, a wholly-owned subsidiary of CSX. Under the agreement, Pharmacia was required to, and did, complete certain remedial actions. Motor Carrier, under the agreement, was obligated to pay costs and expenses of cleanup required by federal or state law, as well as any voluntarily-incurred costs to investigate and remediate contamination occurring after the effective date of the agreement.

Both parties were required to notify the other of any notice of possible environmental contamination liability.

Pharmacia was notified by the U.S. Environmental Protection Agency ("EPA") and the National Oceanic and Atmospheric Administration ("NOAA") of potential environmental liability associated with the Kearny site. Pharmacia, in turn, notified Motor Carrier. Motor Carrier refused to indemnify Pharmacia for the EPA and NOAA actions. Pharmacia then brought suit against Motor Carrier, Intermodal and CSX and filed a motion for summary judgment to pierce Motor Carrier's corporate veil and impose liability upon Intermodal and CSX. The District Court granted Pharmacia's motion.

In affirming in part the District Court's order, the Third Circuit held that Motor Carrier's lack of revenue, failure to hold meetings, absence of employees and the lack of other corporate formalities supported the lower court's decision to allow Pharmacia to pierce Motor Carrier's corporate veil and make Intermodal jointly liable for the indemnification. In reversing the District Court's order that CSX was responsible for the clean-up costs, the Court noted that the agreement only required "Assurance Affiliates" for Motor Carrier if Motor Carrier's value dropped below $5 million. Since the Court affirmed the piercing of Motor Carrier's corporate veil, Intermodal and Motor Carrier together would be valued above $5 million. As such, under the agreement, CSX was not obligated to become an Assurance Affiliate.

B. *Alcoa Inc. v. Alcan Inc.*, 2007 U.S. Dist. LEXIS 47652 (D. Del. July 2, 2007).

This declaratory judgment action concerns a dispute over payment of costs to remedy environmental contamination at a cast-aluminum manufacturing and sales facility (the "Property"), located in Vernon, California. Plaintiff, Alcoa, owned the property before entering into an acquisition agreement with defendant Century Aluminum Company ("Century"), whereby the Property was conveyed in "as is" condition. Alcoa agreed to perform, and asserted that it did perform, specified remedial actions sufficient to obtain a "no further action" statement from the city government. Alcoa also agreed in the acquisition agreement to indemnify Century for a 12-year period for environmental liabilities unrelated to Century's business. Subsequently, Century sold the Property to defendant Pechiney, and Century

provided a separate indemnification to Pechiney and its subsidiary PCP. Ultimately, defendant Alcan acquired Pechiney, making it Alcan's subsidiary, now called ARP. Approximately seven (7) years after Century acquired the Property from Alcoa, Alcan decided to close down the Property. As a part of this closure, PCBs were detected at the Property. Shortly thereafter, Century demanded indemnification from Alcoa under the acquisition agreement. Alcoa rejected Century's demand, stating that the proposed development of the property by Alcan was not "required by directives and/or orders of the" city Environmental Health Department.

This opinion addressed defendants' motion to transfer venue from Delaware to California. In denying defendants' motion to transfer, the District Court noted that venue was proper in Delaware as three of the four defendants were incorporated in Delaware. As such, ARP and PCP had benefited from the protections associated with incorporation in Delaware, and Delaware had an interest in litigation involving Delaware-incorporated companies. Additionally, the acquisition contract designated Delaware as the choice of law. The Court recognized that its analysis would involve a comparison of Alcoa's remedial actions at the Property with Alcoa's obligations under the acquisition agreement, which involved factual aspects of the underlying environmental incidents, which occurred in California. However, the Court would construe the acquisition agreement under Delaware law, and Delaware has an interest in interpretations of contracts under Delaware law. This interest weighs against transfer to California. The Court further held that discovery and travel expenses for defendants did not tip the scales in favor of transfer. Accordingly, the Court denied defendants' motion to transfer.

C. *Alcoa Inc. v. Alcan Inc.*, 495 F. Supp. 2d 459 (D. Del. 2007).

As a part of the case discussed above, *Alcoa Inc. v. Alcan Inc.*, 2007 U.S. Dist. LEXIS 47652 (D. Del. July 2, 2007), this opinion addressed defendant Century's motion to dismiss for failure to join an indispensable party (the city of Vernon, California). In addition to the facts recited above, the Court noted that the required clean-up of environmental contamination at the Property may have been associated with Alcan's plan to sell the Property to the city.

In denying Century's motion to dismiss, the Court noted that joinder of the city was not feasible, since the Court lacked personal

jurisdiction over the city. Thus, if joinder of the city was required, plaintiff's claim would have to be dismissed. However, the Court held that the city was not a necessary party and joinder was not required to move forward. The Court reasoned that determination of remediation liability under the indemnification agreement did not necessitate joinder of the city, and the reason for the remediation (required by the city) may be relevant, but not critical to the determination of liability.

D. *Alcoa Inc. v. Alcan Inc.*, 2007 U.S. Dist. LEXIS 51565 (D. Del. July 17, 2007).

In this opinion, another in a series of decisions (discussed above), the Court addressed defendant Alcan's motion to dismiss for lack of personal jurisdiction. Since Alcan was not incorporated in Delaware, the Delaware Long-Arm Statute would allow the Court to exercise personal jurisdiction over Alcan, if at all, only through its subsidiaries, ARP and PCP, both Delaware corporations. If the Court could exercise such jurisdiction over Alcan, the Court could only do so under the "alter ego theory" or the "agency theory." The Court held that it did not have jurisdiction over Alcan merely because Alcan's subsidiaries were incorporated in Delaware. Further, plaintiff did not establish any misconduct on Alcan's part in forming ARP and PCP; thus, plaintiff did not sufficiently establish that the Court had jurisdiction based on the "alter ego theory". Similarly, the Court held that plaintiff did not establish sufficient evidence to support the Court's jurisdiction under the "agency theory" since the plaintiff did not offer evidence showing that ARP or PCP performed any tasks or actions in Delaware on Alcan's behalf. In conclusion, the Court stated that it was the plaintiff's burden to establish the Court's jurisdiction over Alcan. Since plaintiff did not do so, and did not make a timely request for jurisdictional discovery, Alcan's motion to dismiss was granted.

E. *Rexnord Indus., LLC v. RHI Holdings, Inc.*, 2008 Del. Super. LEXIS 347 (Del. Super. Sept. 17, 2008).

In this indemnification action, the parties filed cross-motions for summary judgment. The Court held that defendant was required to indemnify plaintiff pursuant to an agreement between the parties, and that plaintiff's indemnification award would not be limited to $30,000, notwithstanding that plaintiff received funds from an affiliate for the

remaining costs of plaintiff's defense in the underlying actions. The case arises from a claim for indemnification under an agreement between the parties (the "Agreement"). Under the Agreement, defendant sold the stock of plaintiff to BTR Dunlop Holdings, Inc. The agreement provided for indemnification of plaintiff by defendant. Plaintiff tendered the defense of, and demanded indemnification for, several pending actions, including actions related to investigations by the U.S. Environmental Protection Agency ("EPA") and the Illinois Environmental Protection Agency ("IEPA") of soil and groundwater contamination at or near Rexnord's facility.

In holding that defendant was required to indemnify plaintiff, the Court made the following determinations. First, the Court determined that the tenders of defense were properly addressed to defendant. Second, the agreement between the parties did not require the tender letters to explicitly offer to make the property available for inspection. Third, the tender letters did not request indemnification under the wrong agreement between the parties. Fourth, the agreements between the parties did not eliminate defendant's obligation to respond to the tender letters in writing, and any contention by defendant that the parties had modified the obligation for a written response belies the plain language of the agreement requiring all modifications be made in writing. Thus, defendant was required to indemnify plaintiff and the Court granted plaintiff's motion for partial summary judgment.

Next, the Court turned to defendant's cross-motion for summary judgment as to liability. Defendant argued that the Court should find that plaintiff would have to be found liable in the underlying cases as a result of defendant's contamination before defendant could be liable for indemnification. The Court disagreed, holding that the broad and unambiguous language of the parties' agreement did not make a finding of liability a prerequisite for indemnification.

Finally, the Court addressed defendant's motion for partial summary judgment as to damages. Defendant argued that any damages owed to plaintiff should be limited to $30,000, the amount plaintiff paid out of pocket. Plaintiff was reimbursed by its affiliate for the remaining attorneys' fees and costs. In denying defendant's motion, the Court held that both plaintiff and its affiliate were considered indemnitees under the parties' agreement.

IV. COASTAL ZONE ACT

A. *New Jersey v. Delaware*, 2008 U.S. LEXIS 3088 (March 31, 2008).

The United States Supreme Court upheld DNREC's application of the Coastal Zone Act to prohibit construction of a pier proposed by BP to service a LNG facility in Logan Township, New Jersey. The pier would have extended beyond the mean low water mark on the New Jersey side of the Delaware River within the 12-mile circle, and thus onto Delaware territory. The Court ruled that Delaware may regulate piers and other riparian improvements on the New Jersey side that "exceed ordinary and usual riparian uses," but it "may not impede ordinary and usual exercises of the right of riparian owners to wharf out from the New Jersey shore."

B. *Delaware Dep't of Natural Res. & Env'tl. Control v. Vane Line Bunkering Inc.*, 2007 Del. Super. LEXIS 337 (Del. Super. Nov. 19, 2007).

This appeal by the Department of Natural Resources and Environmental Control ("DNREC") and the Delaware Nature Society ("DNS") challenged the Coastal Zone Industrial Control Board's ("Board") determination that Vane Line Bunkering, Inc.'s ("Vane") proposed vessel-to-vessel oil lightering facility was not prohibited by the Coastal Zone Act ("CZA"). The Board concluded that Vane's proposed facility was a nonconforming use as defined by the CZA, because there were other vessel-to-vessel oil lightering facilities in a coastal zone in operation on June 28, 1971, the cut-off date provided in the CZA. The Court reversed, holding that the Board's decision conflicted with the plain language of the CZA.

The CZA was enacted on June 28, 1971, and prohibits in the coastal zone heavy industry uses of any kind and any bulk product transfer facilities not in operation before the enactment of the CZA. Any heavy industry uses or bulk product transfer facilities in operation on and prior to June 28, 1971 were considered "nonconforming uses" and grandfathered, and any expansion or extension of those nonconforming uses are governed by a permitting process.

Vane proposed a vessel-to-vessel oil lightering facility at the Big Stone Anchorage in the Delaware Bay. The Secretary of DNREC ruled that Vane's proposed facility was not a nonconforming use allowed

by the CZA, because it was not in operation on June 28, 1971. Vane appealed the Secretary's decision to the Board and the Board reversed the decision. The Board concluded that Vane's proposed facility was not a new bulk transfer facility and that vessel-to-vessel oil lightering facilities are nonconforming uses and permissible under the CZA. DNREC and DNS appealed the Board's reversal.

In reversing the Board's decision, the Court held that the Board's reversal of the Secretary's ruling was based on the Board's misunderstanding of the CZA and was contrary to its plain language, the CZA's regulations, and the Delaware Supreme Court's decision in *Coastal Barge v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (1985), holding that a vessel-to-vessel transfer of a bulk product constituted a bulk product transfer facility. The Court held that Vane's proposed facility was a bulk product transfer facility and since it was not in operation on June 28, 1971, it was prohibited by the CZA.

The Court addressed the Board's four conclusions in *seriatim*. First, the Board concluded that Vane's proposed facility was not a new bulk product transfer facility as defined by the CZA. The Court held that Vane's proposed facility was both new and a bulk product transfer facility because it was not yet in existence and the Supreme Court has held that the definition of a bulk transfer facility included the transfer of bulk quantities from vessel-to-vessel. Second, the Board concluded that oil lightering is a nonconforming use as defined by the CZA. The Court disagreed, holding that oil lightering, in the context of this action, is not a nonconforming use since it involved the vessel-to-vessel transfer of oil and the proposed facility was not in existence on June 28, 1971. Third, the Board concluded that the proposed facility constituted a nonconforming use under the CZA, and thus could be expanded or extended by permit. The Court reiterated the fact that the proposed facility was not in existence in 1971, and therefore was not a nonconforming use governed by a permitting process for expansion or extension. Fourth, the Board concluded that the CZA governed the use and not the user and that the activity of oil lightering was grandfathered as an existing use. In its opinion, the Court held that the CZA defines nonconforming uses, in this instance, as bulk product transfer facilities in existence in 1971. Because Vane's proposed facility was not in existence in 1971, it did not constitute a nonconforming use. For these reasons, the Court held that Vane's proposed facility in the coastal zone was prohibited by the CZA.

V. BANKRUPTCY

A. *In re W.R. Grace & Co.*, 2008 U.S. Dist. LEXIS 18486 (D. Del. Mar. 11, 2008).

This action involved an appeal from a bankruptcy court order denying the motion of the State of New Jersey, Department of Environmental Protection's ("NJDEP") for leave to file a late proof of claim. NJDEP sought to fix a civil penalty for false statements, which appellee Grace allegedly made in an environmental condition report when it closed down one of its plants. The District Court affirmed the bankruptcy court's order. The Bankruptcy Rules authorize the bankruptcy court to accept late-filed proof of claims where there is excusable neglect. The Court applied the *Pioneer* factors in determining that the bankruptcy court did not abuse its discretion in determining that NJDEP had not established excusable neglect. *See Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380 (1993). In applying the *Pioneer* factors, the Court first concluded that the bankruptcy court properly held that NJDEP's late claim would be prejudicial to the estate because NJDEP's claim was substantial enough that it would have an impact on the estate's distribution. Second, the Court agreed with the bankruptcy court's finding that NJDEP's four-year delay in filing the proof of claim was substantial and significant. Third, the Court agreed with the bankruptcy court's finding that the NJDEP 's reasons for the delay did not justify a finding that NJDEP's delay was excusable neglect. The NJDEP argued that it was not aware of the claim until after the bar date set by the bankruptcy court, and that it then filed an action against the appellees in state court seeking to fix liability. At that time, the NJDEP decided to wait to litigate and settle the claim through the state action rather than filing a proof of claim in the bankruptcy. The Court held that NJDEP's reasoning for the four-year delay was not compelling. Fourth, the Court concluded that the bankruptcy court did not abuse its discretion in determining that NJDEP did not act in good faith. As a result, the Court affirmed the bankruptcy court's decision that NJDEP's delay was inexcusable.

B. *In re W.R. Grace & Co.*, 2009 U.S. Dist. LEXIS 21018 (D. Del. Mar. 12, 2009).

This opinion addressed the State of New Jersey, Department of Environmental Protection's ("NJDEP") appeal of the bankruptcy court's decision enjoining the NJDEP's efforts to fix a civil penalty against the

appellee Grace and two of its officers for alleged false statements contained in an environmental condition report. The bankruptcy court found that such efforts did not fall within the statutory exceptions to the automatic stay. The District Court disagreed with the reasoning of the bankruptcy court, but affirmed the bankruptcy court's grant of an injunction. In doing so, the Court found that Congress provided for an exception to the automatic stay for governmental entities to use their police or regulatory powers to fix damages for violations of the law. The Court further found that the legislative history and case law supported the NJDEP's argument that its efforts were exempted from the automatic stay since it was exercising its police and regulatory powers. Notwithstanding these conclusions, the Court held that the bankruptcy court's injunction was appropriate and should be affirmed.

In determining that the bankruptcy court's injunction was warranted, the Court examined the factors necessary for an injunction. In order to obtain an injunction, the appellee was required to establish 1) the likelihood of success, 2) Grace's irreparable harm absent the injunction, 3) the extent to which NJDEP would suffer irreparable harm if an injunction were granted, and 4) the public interest. The Court held that, although the NJDEP would likely succeed in its efforts to fix the amount of a civil penalty, it would not be able to recover any funds from the estate. Thus, the Court found that this factor weighed in favor of appellee Grace. The Court next turned to the irreparable harm factors and determined that it was unclear whether these two prongs favored Grace or NJDEP. Finally, the Court could not determine whether the public policy factor favored Grace or NJDEP.

Although the analysis of the injunction factors did not weigh substantially to one side or the other, the Court held that other facts in the case resolved the dispute in favor of Grace and the grant of an injunction. These other factors were 1) the underlying bankruptcy litigation, 2) NJDEP's inability to recover any funds due to its failure to timely file a claim, and 3) NJDEP's inability to recover any funds from the former Grace officers since the suit "related to" the underlying bankruptcy litigation. As to the last factor, the Court noted that Grace was obligated under its bylaws to indemnify its officers for actions brought against them, independent of any additional action against the debtor. As a result, any state suit against Grace's former officers to fix a penalty would affect the bankruptcy, meaning that the bankruptcy court has "related to" jurisdiction over such action, and that the state action properly should be enjoined.

C. *In re Kaiser Aluminum Corp.*, 2009 U.S. Dist. LEXIS 4299 (D. Del. Jan. 21, 2009).

Appellant, Moss Landing Commercial Park, LLC ("Moss Landing"), appealed the Bankruptcy Court's order requiring it to dismiss its action filed against debtors, Kaiser Aluminum Corporation and its related entities ("Kaiser"). Moss Landing sought an injunction requiring Kaiser to remediate environmental contamination to land Moss Landing purchased prior to the confirmation of Kaiser's plan by the bankruptcy court. The Court affirmed the bankruptcy court's order that the plan's injunction prohibited Moss Landing's claims, because they related to monetary damages (civil penalties, indemnification and contribution for liabilities). Accordingly, the Court held that the bankruptcy court did not err in holding that the action filed against Kaiser violated the injunction.

VI. CORPORATE LIQUIDATION – TRUST FUND DOCTRINE

Virgin Islands v. Goldman, Sachs & Co., 937 A.2d 760 (Del. Ch. 2007).

The Virgin Islands brought various claims against Goldman Sachs, the passive shareholder of a dissolved corporation, seeking to recover damages for environmental contamination allegedly caused by the defunct corporation. Relying in part on the "trust fund doctrine," the Virgin Islands sought to recover distributions that Goldman Sachs allegedly received after the corporation was dissolved from the corporation and a liquidating trust. Goldman Sachs successfully moved to dismiss the action. The Court of Chancery ruled that the Virgin Islands was barred from asserting its claim by the three year corporation wind up provisions set forth in the Delaware General Corporation Law, 8 Del. C. §§ 278 and 325(b). The Court found that Goldman Sachs received the distribution in good faith. The Court also ruled that the Virgin Island's claims were barred by the doctrine of laches for its extremely late filing of the suit.

VII. MOOTNESS

Am. Littoral Soc'y, Inc. v. Bernie's Conchs, LLC, 954 A.2d 909 (Del. 2008).

DNREC proposed two alternative horseshoe crab regulations for Delaware. Although the hearing officer recommended Option 1, which would

have prohibited the harvest of female horseshoe crabs and limited the number of male horseshoe crabs that could be harvested, the Secretary of DNREC adopted Option 2, creating a two-year moratorium on any horseshoe crab harvesting. Appellees filed suit under the Delaware Administrative Procedures Act to challenge the validity of the regulations. In its opinion the Superior Court found that the moratorium did not have a rational basis in the record and issued an order vacating the regulation.

Subsequently DNREC issued emergency regulations consistent with the Superior Court's Opinion and later promulgated separate horseshoe crab regulations, which effectively adopted Option 1 through 2008, in a separate rulemaking process. Meanwhile, the appellants had filed a motion to intervene for purpose of appeal. When the Superior Court denied this motion, the appellants appealed that decision to the Delaware Supreme Court. Because the regulation that was the subject of the Superior Court decision had been superseded by a subsequent rulemaking process, the Supreme Court found the issue to be moot and dismissed the appeal. The Supreme Court rejected appellants' assertions that the issue raised in the appeal was a matter of public importance or was "capable of repetition, yet evading review," and so rejected the argument that the issue implicated an exception to the mootness doctrine.

VIII. CERCLA

A. *Action Mfg., Co. v. Simon Wrecking Co. Inc.*, 2008 U.S. App. LEXIS 16145 (3d Cir. July 28, 2008).

In this case, Simon "appeal[ed] the District Court's order finding Simon liable as a transporter of hazardous wastes and awarding a monetary judgment to the plaintiffs in their contribution action against Simon under [CERCLA]. Appellees had "entered into a consent decree with the EPA and the Pennsylvania Department of Environmental Protection, agreeing to undertake remediation of [a Superfund Site]." Simon admittedly transported hazardous substances to the site, but disputed its status as a "transporter" for the purpose of CERCLA liability.

The Third Circuit affirmed the order of the District Court. The Court found that the evidence appellees adduced was sufficient to support the District Court's determination that Simon acted as a transporter for liability purposes because it "selected or actively participated in the selection of the Chemclene site . . . ." In addition,

the Court found no statutory basis to support Simon's assertion that the District Court erred in awarding a monetary judgment on the contribution claim, rather than a declaratory judgment. Finally, the Court concluded that the District Court did not abuse its discretion in imposing a 50 percent uncertainty premium on Simon in calculating the amount owed.

B. *E.I. DuPont de Nemours & Co. v. U.S.*, 508 F.3d 126 (3d Cir. 2007).

In light of the U.S. Supreme Court's order to vacate the prior judgment of the Third Circuit in this case, the Court reversed the decision of the District Court denying DuPont's right to contribution from the United States and remanded for further proceedings. In its original opinion, the Third Circuit held that a party which is responsible for some portion of the contamination at the site, and which conducts a voluntary cleanup, may not seek contribution from other responsible parties, including the government, for costs of the cleanup. The Supreme Court rejected this position in *Atlantic Research Corp. v. United States*, however, concluding that, although a potentially responsible party ("PRP") may not seek contribution from other responsible parties under Section 113(f) when "no § 106 or § 107 action was pending or had been brought against [the PRP seeking contribution], it could bring a cost recovery claim under § 107(a)." In this opinion, the Third Circuit overruled its earlier holding in this case, and rejected the precedent of two of its earlier decisions, *New Castle County v. Haliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997) and *Matter of Reading Co.*, 115 F.3d 1111 (3d. Cir. 1997), which both refused to recognize a right to contribution under Section 107.

C. *Transtech Indus. v. A&Z Septic Clean*, 2008 U.S. App. LEXIS 6156 (3d Cir. Mar. 24, 2008).

Appellant Transtech Industries ("Transtech") and appellee SCA Services, Inc. ("SCA") attempted to settle through arbitration a dispute over their respective shares of responsibility for cleaning up Kin-Buc landfill, a Superfund site. Unsatisfied with the arbitrator's decision, Transtech moved in District Court to

vacate the arbitration award and obtain a new arbitration hearing. The District Court denied Transtech's motion on both substantive and procedural grounds and the Third Circuit affirmed. In rejecting the substantive challenges, the Third Circuit found that "specific contract language rationally support[ed] the interpretation chosen by [the arbitrator] and affirmed by the District Court." The Court also rejected Transtech's procedural arguments, finding that Transtech's due process rights were not violated in the arbitration proceedings.

D. *Beazer East, Inc. v. Mead Corp.*, 525 F.3d 255 (3d Cir. 2008).

In this case, a property owner, Beazer, sought contribution for investigation and cleanup costs under CERCLA from the former property owner, Mead. In 1996, the District Court dismissed Beazer's § 107 claim, concluding that Beazer's §§ 107 and 113(f) claims were duplicative. In December 2004, after an appeal before the Third Circuit had been argued, but before the Court had filed its opinion, the Supreme Court decided *Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004), holding that "a private party who has not been sued under § 106 or § 107(a)...[cannot] obtain contribution under § 113(f)(1) from other liable parties." In June 2005, notwithstanding *Cooper*, the Third Circuit issued an opinion remanding the case to the District Court to allocate liability under § 113 (f).

In 2006, six months after the Third Circuit filed its opinion, remanding the case to the District Court, Mead asserted that the District Court lacked subject matter jurisdiction because Beazer had not been sued under §§ 106 or 107. On appeal, the Third Circuit held that the District Court retained its subject matter jurisdiction, concluding that the "civil action" requirement in § 113(f) is an element of the claim, not jurisdictional. The Third Circuit also rejected Mead's assertion that the District Court lacked subject matter jurisdiction because the *Cooper* decision rendered Beazer's section 113(f)(1) claim "insubstantial". Finally, the Third Circuit concluded that Mead waived its right to challenge the applicability of § 113(f)(1), having failed to raise it or mention the *Cooper* case earlier. Therefore, the Court remanded the case for an equitable allocation proceeding.

IX. PREEMPTION

New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238 (3d Cir. 2007).

The Third Circuit addressed the issue of whether the federal regulation of railroads preempted certain state environmental regulations. The New York Susquehanna and Western Railway Corp. ("Susquehanna") operated five solid waste transloading facilities in New Jersey. New Jersey eventually promulgated a series of regulations in response to the various health, safety, and environmental hazards found at Susquehanna's facilities, but Susquehanna refused to comply with the regulations, claiming that they were preempted by the Interstate Commerce Commission Termination Act. The Court concluded that the facts of the case did not support the District Court's "conclusion that all of the State's environmental regulations at issue [were] preempted..."

The Court held "that the Termination Act does not preempt state regulation if it is nondiscriminatory and not unreasonably burdensome." Believing that some, but not all, of the state regulations at issue may meet this test, the court "vacate[d] the District Court's order permanently enjoining the State from enforcing the regulations, and remand[ed] for consideration of whether each regulation is preempted."

X. TAXATION

Alcoa, Inc. v. U.S., 509 F.3d 173 (3d Cir. 2007)

In this case, the Third Circuit denied Alcoa's claim that its "expenses for environmental clean-up of its industrial sites, mandated by changes in environmental law, qualified for the beneficial tax treatment afforded by section 1341 of the Internal Revenue Code, 26 U.S.C. § 1341." Section 1341 allows certain taxpayers "to take a deduction in their current tax year for the amount of taxes that the taxpayer would have saved if the amount restored had not been included in its reported gross income in the prior tax year." Finding that "only the most torturous reading of section 1341 could equate Alcoa's expenditures to clean up its sites with restoring moneys to the rightful owner" the Court affirmed the District Court's grant of the government's motion for summary judgment and its denial of Alcoa's.